80-385

No.

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

DR. ALAN SHAW, *Petitioner,*

v.

THE HOSPITAL AUTHORITY OF COBB COUNTY, ET AL,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does the refusal by a public hospital to amend its bylaws to enable podiatrists to be considered for staff privileges deny the petitioner due process guaranteed by the Fourteenth Amendment to the Constitution of the United States?

2. Does the lack of reasonable basis for such refusal amount to a denial of equal protection guaranteed by the Fourteenth Amendment?

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DR. ALAN SHAW, *Petitioner,*

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THE HOSPITAL AUTHORITY OF COBB COUNTY, ET AL,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-captioned case on March 31, 1980.

LIST OF PARTIES TO PROCEEDING BELOW

In addition to the petitioner (plaintiff below) and The Hospital Authority of Cobb County, the individual members of the Authority were named as defendants. Their names are Leon Hames, Chester A. Austin, Dr. Virgil L. Curry, L.G. Landers, Harold M. Nix, Lee E. Partain, Jr., Mrs. Barbara B. Williams, Miles A. Willis and Charles "Pete" Wood.[1]

The American Medical Association filed a brief in the Court of Appeals as *amicus curiae* to "clarify" its position and the Georgia Podiatry Association filed an *amicus* brief urging reversal of the District Court.

CITATION TO OPINIONS BELOW

The decision of the District Court is unreported. The opinion of the Court of Appeals, which also includes the opinion of the District Court is reported at 614 F.2d 946 and appears at pp. 1a-12a of the Appendix to this petition. The opinion of the United States Court of Appeals for the Fifth Circuit at an earlier stage of this litigation, *Shaw* v. *Hospital Authority of Cobb County,* 507. F.2d 625 (1975)[2], has been reproduced at pages 13a-20a of the Appendix.

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[1] Since the filing of this action in the District Court, Dr. Richard Hammonds, William Dale Koch and William F. Thomas have become members of the Authority; Mr. Nix, Dr. Curry and Messrs. Partian and Willis are no longer members.

[2] For convenience, these earlier proceedings have been referred to as *Shaw I,* whereas the present case is identified as *Shaw II.*

JURISDICTION

The opinion of the Court of Appeals was filed on March 31, 1980. Following the filing of a timely petition for rehearing *en banc*, the same was denied on June 12, 1980. The judgment issued as mandate is dated July 30, 1980.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C., Section 1254(1).

STATUTES INVOLVED

1. The pertinent portion of the Fourteenth Amendment to the United States Constitution states:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of Citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. The practice of podiatry is governed by Georgia Code §84-601, as follows:

> "Podiatry (chiropody) for the purpose of this Chapter, means the diagnosis, medical, surgical, mechanical, manipulative and electrical treatment limited to the ailments of the human foot and leg. No podiatrist shall do any amputation or use any anesthetic other than local.
>
> Podiatrists shall not be deemed to be included in the expressions 'licensed doctors of medicine', 'doctors of medicine', 'doctors of medicine licensed to practice in this State' and the like."[3]

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[3] The second paragraph of the above-quoted statute was added by the laws of 1973 and repealed by Act 1232 of the 1978 Georgia legislature.

STATEMENT OF THE CASE

Dr. Alan Shaw is a doctor of podiatric medicine, licensed to practice his profession by the State of Georgia. The petitoner also holds a master's degree in surgery and is certified by the national certifying board in podiatric surgery as a diplomate. As early as 1973, petitioner applied to the respondent hospital for staff privileges in order to treat his patients at that facility. His application was rejected on the grounds that neither the bylaws of the hospital, nor those of the medical-dental staff, authorizes appointment of podiatrists to the staff. The aforementioned bylaws did in fact limit membership to physicians and dentists. Dr. Shaw's requests that appropriate changes be made in the bylaws to make it possible for podiatrists to be considered for privileges were denied. Neither at that stage of the proceedings, nor at any time thereafter, did the respondents make any determination, or reach any conclusions, concerning the petitioner's qualifications to perform the procedures requested by him.[4] In July, 1973, Dr. Shaw brought an action in the United States District Court for the Northern District of Georgia seeking injunctive relief against the actions of the Authority. Following an evidentiary hearing, the District Court denied the relief requested and dismissed the complaint.[5] That order was

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[4] It should be noted that in the District Court proceedings in *Shaw I,* respondents stipulated to Dr. Shaw's competence "as a podiatrist".

[5] Dr. Shaw's position was supported by an orthopedic surgeon who was familiar with his qualifications and testified to his willingness to refer patients to Dr. Shaw. The respondents called an orthopedic surgeon who expressed approval respecting the existing limitations placed on podiatrists and said he would not refer patients to a podiatrist.

vacated by the Court of Appeals in *Shaw I, supra,* with directions to grant petitioner new hearings before the Medical-Dental staff and the Hospital Authority itself. The hearings that were ordered by the appellate court were to focus on Dr. Shaw's "liberty interest", which the Court of Appeals found to entitle him to procedural due process in accordance with this Court's opinion in *Board of Regents* v. *Roth,* 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). Hearings were held before both bodies during which the petitioner presented proposed bylaws changes which, both parties agreed, were necessary to make it possible for podiatrists to apply for privileges. It was undisputed that favorable action on the proposals would have to precede an evaluation of Dr. Shaw's application, or of that of any other podiatrist. In the course of the hearings, petitioner presented extensive information concerning his own background and training, as well as the education and training of podiatrists generally. At the hearings, testimony was given by an orthopedic surgeon, the general import of which was that orthopedic surgeons can perform all of the functions performed by podiatrists, but that the former can better meet the needs of the patient because of their ability to treat the "whole body".

As a result of the hearings, the Hospital Authority reiterated its denial of Dr. Shaw's application. The Authority concluded that a change in its bylaws was inappropriate since the services that podiatrists would provide are already being furnished by physicians who hold unlimited licenses and who have "more extensive training". The respondents added that there is a distinction between podiatrists and dentists that justifies the decision to grant staff privileges to the members of the latter profession. In the view of the Authority, the distinction

lies in the fact that the services of dentists are not available from physician members of the staff. Finally, the respondents stated that, according to the standards of the hospital, surgical privileges were not granted to persons who had the training of podiatrists, even if they had an unlimited license.[6] Following final action by the respondents denying his application, the petitioner returned to the District Court alleging failure by the Authority to have held hearings in accordance with the appellate mandate of *Shaw I.* The parties filed cross-motions for summary judgment. The District Court, without hearing, granted the respondents' motion and denied that of the petitioner. (See Appendix pp. 1a-12a) On appeal, the Order of the District Court was affirmed on the basis of the lower Court's opinion. (Appendix p. 1a) A petition for rehearing *en banc* was denied.

In both *Shaw I* and *Shaw II,* the jurisdiction of the District Court was invoked pursuant to Title 28, U.S.C., §1343, Title 42 U.S.C. §1983, Title 42, U.S.C. §291, Title 28 U.S.C. §2201, the due process and equal protection clauses of the Fourteenth Amendment to the U.S. Constitution and Section 600 of the Public Health Services Act. In *Shaw I,* the Court of Appeals found the actions of the hospital to be subject to the Fourteenth Amendment, and in *Shaw II,* the District Court expressly referred to jurisdiction pursuant to 28 U.S.C. §1331 and 1343(3).

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[6] It should be noted that the respondents' explanation for denying privileges to podiatrists, which was part of the proceeding in *Shaw I,* varied but slightly from the statements referred to above.

REASONS FOR GRANTING THE WRIT

The uncomplicated nature of the constitutional rights involved in this case should in no way detract from their great importance. This proceeding presents the latest phase of a seven-year struggle whereby the member of a licensed profession, who by law may diagnose and treat by medical, surgical, and other means, has sought to obtain redress against the categorical exclusion of his discipline from the facilities of a public hospital. Although the District Court has repeatedly stated that podiatry is "a honorable profession", it has nevertheless twice ruled that a decision which is totally class-based in denying podiatrists the opportunity to apply for staff privileges, is reasonably related to the operation of the hospital. The second order of the District Court, now upheld by the Court of Appeals without opinion, is the basis for the present petition.

At the outset, it should be emphasized that the petitioner has never suggested in the course of this litigation that all podiatrists are necessarily eligible for staff privileges at respondents' hospital, any more than it would automatically follow that all medical doctors and dentists are entitled to such privileges. Dr. Shaw has sought nothing more than the ability to demonstrate his qualifications to practice his profession at Cobb General Hospital. He did not argue that his practice license alone mandates the granting of such privileges, but he did consistently contend that the respondents' bylaws must be so altered as to enable the petitioner to submit his credentials and his individual capabilities to scrutiny. The Hospital Authority's actions have totally precluded such individual evaluation. The respondents' decisions have erected a total barrier to any attempt by the peti-

tioner to be judged on his individual merit. On the contrary, without the benefit of evidence, the respondents have concluded — and the courts below have agreed — that podiatrists, regardless of individual qualifications, should be prevented from treating their patients in hospitals. The people of Georgia through their legislature, as have the legislatures of all of our states, prescribed the criteria and procedures pursuant to which podiatrists are to be licensed. Just as in the case of dentists, who are licensed to render medical and surgical care in their limited area of practice, podiatrists are authorized to provide such care on the foot and leg. Just as dental patients will from time to time require hospitalization, patients attended to by podiatrists should be in a position to obtain such treatment. In the absence of a clear declaration to the contrary, it is hardly conceivable that the same legislature that established public hospitals intended to deny their availability to patients of a single class of duly licensed practitioners.

The Court of Appeals in *Shaw I* held clearly and unequivocally that petitioner has a liberty interest in seeking staff privileges at the hospital, which liberty interest is protected by the Fourteenth Amendment. 507 F. 2d 628. Accordingly, the Court held that "[t]he procedural due process to which Dr. Shaw was entitled had to be fashioned for and directed to that liberty interest" (507 F. 2d 629).

The constitutional principles upon which the Court of Appeals based its decision have been heretofore identified by this Court. In *Board of Regents* v. *Roth,* 408 U.S. 564, 92 S. Ct. 2701, 33 L.ED. 548 (1972), the Court said:

> "The requirements of procedural process apply only to the deprivation of interests encompassed by

> the Fourteenth Amendment's protection of liberty and property. *When protected interests are implicated,* the right to some kind of prior hearing is paramount." (408 U.S. 567-70; emphasis added). " 'Liberty' and 'property' are broad and majestic terms. They are among the '[g]reat [constitutional] concepts . . . . . purposely left to gather meaning from experience . . . . . [t]hey relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged.'. *National Insurance Co.* v. *Tidewater Co.,* 337 U.S.582, 646 (Frankfurter, J., dissenting)." (408 U.S. 564).
>
> "In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed. See, e.g. *Bolling* v. *Sharpe,* 347 U.S. 497, 499-500; *Stanley* v. *Illinois,* 405 U.S. 645." (408 U.S. 572).
>
> "The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests — property interests — may take many forms." (408 U.S. 576).

In *Meyer* v. *Nebraska,* 262 U.S. 390, 43 S. Ct. 625, 67 L.Ed 1042 (1923) — perhaps the most renowned among this line of cases, the Court said:

> "The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect." (262 U.S. 399-400).

In *Meyer,* the Court struck down an entire statute on the basis of a violation of fundamental liberties. Similarly, when the Court perceived a deprivation of basic guaranteed rights, it had no hesitancy to grant substan-

tive relief in *Bolling* v. *Sharpe,* 347 U.S. 497, 499-500, 74 S. Ct. 93, 98 L.Ed 884 (1954), where the principle was stated as follows:

> "Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective."

A particularly instructive discussion of "liberty" under the Fourteenth Amendment, appears in Mr. Justice Stewart's concurring opinion in *Roe* v. *Wade,* 410 U.S. 113, 168-169, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), a pertinent portion of which reads as follows:

> "In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed," *Board of Regents* v. *Roth,* 408 U.S. 564, 572. The Constitution nowhere mentions a specific right of personal choice in matters of marriage and family life, but the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment covers more than those freedoms explicitly named in the Bill of Rights. See *Schware* v. *Society of Sisters,* 268 U.S. 510, 534-535; *Meyer* v. *Nebraska,* 262 U.S. 390, 399-400. Cf. *Shapiro* v. *Thompson,* 394 U.S. 618, 629-630; *United States* v. *Guest,* 383 U.S.745, 757-758; *Carrington* v. *Rash,* 380 U.S. 89, 96; *Aptheker* v. *Secretary of State,* 378 U.S. 500, 505; *Kent* v. *Dulles,* 537 U.S. 116, 127; *Bolling* v. *Sharpe,* 347 U.S. 497, 499-500; *Truax* v. *Raich,* 239 U.S. 33, 41.
>
> As Mr. Justice Harlan once wrote: '[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from

> unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.' *Poe* v. *Ullman,* 367 U.S. 497, 543 (opinion dissenting from dismissal of appeal) (citations omitted)."

What transpired after the remand in *Shaw I* was little more than formal compliance with the requirements of the appellate court. Apparently, the respondents were of the opinion that all that was necessary was to hold the hearings and then to reaffirm their previous conclusions regarding podiatry as a professional class. Although Dr. Shaw took all necessary steps that would be reasonably necessary to enable the hospital to consider his own, personal application, he encountered a response that consisted of complete rejection—not because the hospital did not find him qualified, but simply because he is a podiatrist. It is difficult to comprehend how the Authority conceived this approach to be related to petitioner's constitutionally protected liberty interest to practice his profession.

The District Court correctly perceived that in the final analysis it is the "reasonableness" of the restriction imposed that will determine its legal validity. We submit that the District Court had no evidence before it which, even granting full deference to the hospital's managerial discretion, warranted the conclusion that a reasonable basis existed for the actions complained of.[6]

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[6] The decision of the Hospital Authority appears at pp 22a-24a of the Appendix.

The statement that the services that podiatrists would render are already being provided by other doctors with an unlimited license and more extensive training, falls short of any standard of reasonableness. The fact that the licenses of medical doctors and podiatrists in one area are parallel does not justify the exclusion of an entire class of practitioners. Necessarily, a doctor who holds an unlimited license may be expected to have more "extensive" training, but this does not denote a qualitative difference. Respondents' reference to the standards of the Joint Commission on Accreditation of Hospitals likewise adds no dimension of reasonableness to the decision below. The Authority emphasized the *permissive* nature of hospital privileges for podiatrists, as recognized by the Joint Commission. However, the Joint Commission does not mandate hospital privileges for any applicant and it insists on the demonstration of individual competence for all practitioners. Moreover, the Joint Commission only recognizes medical doctors, osteopaths, dentists and podiatrists for clinical privileges in hospitals. The mere fact that, as the District Court found, the qualifications of podiatrist vary individually, lends no support to the respondents' decision. They were certainly empowered to set their standards in such a manner that the excellence of patient care would not be compromised. However, we submit, such standards, to pass the test of reasonableness, may not preclude the ability of individuals, who are duly licensed to practice their profession, to submit their credentials and competence to impartial review.

The ability to practice in a hospital has long been recongized as a matter of great importance, and often as one of absolute necessity. *Wyatt* v. *Tahoe Forest Hospital District,* 174 Ca. App.2d 709,345 P.2d 93; *Foster* v. *Mobile County Hospital Board* (5th Cir. 1965)

398 F.2d 227; *Milford* v. *People's Community Hospital,* 380 Mich. 49, 155 N.W.2d 835 (1968). It has also been held that standards may not be designed in such a fashion that they will have the effect of arbitrary exclusion from hospital facilities. *McElhinney* v. *Wm. Booth Memorial Hospital* (Ky.Supreme Court) 544 S.W.2d 216 (1976); *Rosner* v. *Eden Township Hospital District,* 58 Cal.2d 592, 25 Cal. Rep. 551, 375 P.2d 431 (1962). The public's involvement in the provision of hospital services has convinced more and more of our courts that arbitrary denial of staff privileges even by so-called "private" institutions can no longer be tolerated. See, e.g. *Greisman* v. *Newcomb Hospital,* 40 N.J. 389, 192 A.2d 817 (1963); *Woodard* v. *Porter Hospital,* Vt. 419, 217 A.2d 37 (1966); *Silver* v. *Castle Memorial Hospital* (Hawaii), 497 P.2d 564 (1972); mot. den. 501 P.2d 60; cert. den. 409 U.S. 1048 (1972); *McElhinney* v. *Wm. Booth Memorial Hospital, supra Sams* v. *Ohio Valley Gen.Hosp. Assoc.* (4th Cir. 1969) 413 F.2d 826. The requirement of "reasonableness" in granting hospital privileges has never found clearer expression than in the landmark opinion of the Supreme Court of New Jersey in *Greisman* v. *Newcomb Hospital, supra* which stated in pertinent part:

> "Hospital officials are properly vested with large measures of managing discretion and to the extent that they exert their efforts toward the elevation of hospital standards and higher medical care, they will receive broad judicial support. But they must never lose sight of the fact that the hospitals are operated not for private ends but for the benefit of the public, and that their existence is for the purpose of faithfully furnishing facilities to the members of the medical profession in aid of their service to the public. They must recognize that their

> powers, particularly those relating to the selection of staff members, are powers in trust which are always to be dealt with as such. While reasonable and constructive exercises of judgment should be honored, courts would indeed be remiss if they declined to intervene where, as here, the powers were invoked at the threshold to preclude an application for staff membership, not because of any lack of individual merit, but for a reason unrelated to sound hospital standards and not in furtherance of the common good."

In the recent case of *Guerrero* v. *Burlington County Memorial Hospital,* 70 N.J. 344, 360 A.2d 334 (1976), the same court re-affirmed its holding in *Greisman* and added the following:

> "Our courts, as well as others, have consistently evinced a sensitivity to the need of hospital administrators to be able reasonably to exercise their discretion without judicial interference, at the same time remaining alert to strike down action that is discriminatory or unfair". (360 A.2d 340).

In *Guerrero,* the Court upheld the denial of privileges where that action was grounded on a desire to prevent overtaxing facilities. However, the Court made this observation:

> "Nothing we have said should be in any way construed as suggesting that hospitals may routinely deny staff privileges to doctors moving into an area. Any denial of such privileges, if motivated by a desire to exclude newcomers in order to maintain the status quo of the staff, would not be judicially tolerated." (360 A.2d 341).

We recognize the long-established principle that no one has an *absolute* constitutional right to practice in a public hospital. *Hayman* v. *Galveston,* 273 U.S. 414, 47 S. Ct. 363, 71 L.Ed. 714 (1927). However, as the

District Court acknowledged (App. p. 8a) liberty interest dictates that such right only be restricted upon a showing of an adequate due process hearing and the fact that the restriction was "grounded upon a rational basis designed to further a legitimate state interest". It is the lack of such a rational basis that places the decisions below in such sharp and irreconcilable conflict with this Court's interpretation of "liberty" as stated in such cases as *Meyer* v. *Nebraska* and *Board of Regents* v. *Roth, supra.*

In a series of decisions this Court has held that where there are substantial underlying rights involved, a state agency may impose conclusive factual presumptions only upon a showing of strong administrative necessity that precludes adjudication on an individual basis. The more valuable the individual right in issue is, the greater the constitutional obligation placed on the state to base its administrative decisions on individual merit. Thus, in *Stanley* v. *Illinois,* 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972), it was held that a state could not deprive an unwed father of the opportunity to show that he was qualified to care for his children, by creating an irrebuttable administrative presumption based on the sole fact that he had not married the children's mother. Similarly, the Supreme Court has rejected conclusive presumptions in cases of teachers who were deemed incompetent to teach beyond the fifth month of pregnancy. *LaFleur* v. *Cleveland Board of Education,* 414 U.S. 622, 94 S. Ct. 791, 39 L. Ed. 2d 52 (1973). In *Vlandis* v. *Klein,* 412 U.S. 441, 93 S. Ct. 2230, 37 L. Ed. 3d 63 (1978), it was held that for purposes of tuition criteria, a state may not irrebuttably presume that a student remained a non-resident, merely because he had that status at the time he first enrolled at

the institution. To the same effect is *Andrews* v. *Drew Municipal Separate School District*, 507 F. 2d 611, (5th Cir. 1975).

In each of the cited cases, the Court found the existence of important, constitutionally protected rights. It was further held that only when it can be demonstrated that there is strong necessity for the administrative presumption, and little likelihood of deprivation of liberty, that procedures of this nature will be upheld. As the Court said in *Andrews* v. *Drew, supra*:

> "The law is clear that due process interdicts the adoption of an irrebuttable presumption, as to which the presumed fact does not necessarily follow from the proven fact." (507 F. 2d. 614).

Applying these teachings to our case, it is evident that the recognized liberty interest of petitioner to practice his profession is a right that far outweighs any considerations of administrative convenience, that may have prompted the hospital authority to establish rules in reference to podiatrists generally. In the light of the record in the instant case, it is apparent that the administrative rules applied to Dr. Shaw are indefensibly overbroad. In the face of a record that speaks eloquently to the qualifications of podiatrists, to those of Dr. Shaw, and to the acceptance of podiatry by the medical community, the irrebuttable presumption preventing Dr. Shaw from proving his abilities as an individual violates both the letter and the spirit of judicial precedent.

II

In *Shaw I*, petitioner's equal protection argument was rejected on the ground that the class of practitioners of the healing arts consisting of full-practice physicians, dentists and podiatrists was too large to create a class of

persons similary situated. Whether this ruling in the light of the record presented in *Shaw I* was correct, need not be decided. However, we submit that in view of the actions taken by the respondents after the remand, the rulings below have sustained procedures that are indeed violative of equal protection. Chief Judge Brown in a concurring opinion in *Shaw I* said:

> I concur in the opinion and the result. I would emphasize, however, that in the procedural due process hearing the intrinsic reasonableness of the regulation is the principal matter for inquiry.
>
> While I would join the Court's conclusion that the practice of podiatry and medicine do not coalesce, the practice of podiatry is a statutorily recognized right to engage in procedures and techniques which might be characterized as "medically radical". The State of Georgia recognizes that persons of this profession have significant professional qualifications, responsibilities, and privileges.
>
> Considering all that Georgia permits and encourages them to do, the question perhaps boils down to whether any rational basis exists for denying podiatrists, or more important their patients, the essential facilities of a twentieth century hospital. Before podiatrists can be relegated in the performance of their duties to a garret, there must be a rational basis for regulations which effectively deny access to modern hospital facilities. The due process hearing, if conducted with due process, may therfore precipitate a serious question of equal protection. (507 F. 2d 619)

We submit that this statement with complete accuracy forecast the legal consequences of the Authority's response to the remand. We suggest that the rational basis test for due process, as discussed in Part I of this petition, is inextricably linked to equal protection. A

properly drawn classification based on reasonable grounds can create appropriate distinctions between health care practitioners. Thus, the Joint Commission on Accreditation of Hospitals specifically mandates that a doctor with an unlimited license must be responsible for over-all medical care of a patient hospitalized for treatment by a podiatrist *or* dentist. However, such different treatment of health care practitioners is reasonably related to their legally circumscribed scope of practice. The underlying liberty interest of dentists and podiatrists is not impaired, so long as they have the opportunity to have their capabilities to treat patients in a public hospital judged on a basis free from arbitrary class distinctions.

It has been held that when a state establishes classifications, they must be "reasonable" in the light of their purpose. *Carrington* v. *Rash,* 380 U.S. 89, 85 S. Ct. 775, 13 L. Ed. 2d 675 (1965). Legislation may not prescribe different treatment to persons placed by statute "in different classes on the basis of criteria wholly unrelated to the objective of that statute". *Reed* v. *Reed,* 404 U.S. 71, 92 S. Ct. 251, 30 L.Ed.2d 225 (1971); see also: *Stanton* v. *Stanton,* 421 U.S. 14, 95 S. Ct. 1373, 43 L.Ed.2d 688. In cases such as *Reed* and *Stanton*, the Court found it unnecessary to decide whether classifications based on sex were in the "inherently suspect" or "rational basis" category. This departure from the traditional "two tier" concept appears to be particularly appropriate where the classification is manifestly irrational and the effect on fundamental rights is significant. While we do not contend that the classification here involved is "inherently suspect," we nevertheless submit that the encroachment on basic constitutional rights and the complete lack of legitimate state interest should lead to judicial condemnation on

equal protection grounds. As Mr. Justice Powell said in *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 92 S. Ct. 1400, 31 L. Ed. 2d 768 (1972):

> "The essential question in all the foregoing [equal protection] cases is however, inevitably a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?" (406 U.S. 173).

The respondents' refusal to amend the hospital bylaws to enable podiatrists to apply for privileges on an individual basis is unreasonable on its face. There simply is no administrative necessity to impose restrictions of this magnitude. A member of a recognized health profession, who by law may treat medically and surgically, cannot be totally prevented from demonstrating his ability to treat his patients in a public hospital. The resulting discrimination represents a serious deviation from well-established principles of equal protection under the Fourteenth Amendment.

CONCLUSION

For the reasons heretofore stated, petitioner submits that the writ of certiarori should be granted.

Respectfully submitted,

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Attorney for Petitioner

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

March 31, 1980

No. 77-3436

DR. ALAN SHAW, *Plaintiff Appellant,*

v.

The Hospital Authority Of Cobb County et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia.

Before BROWN, HILL and RANDALL, *Circuit Judges.*

PER CURIAM:

We affirm for the reasons set forth in the district court's opinion and order of December 31, 1977, attached hereto as an appendix.

APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTIONS
NO. 18627
NO. 76-991A

DR. ALAN SHAW

v.

THE HOSPITAL AUTHORITY OF COBB COUNTY, ET AL.

ORDER

Plaintiff, a Doctor of Podiatric Medicine and Surgery licensed to practice in the State of Georgia, brought these actions for injunctive and declaratory relief against the Hospital Authority of Cobb County, Georgia and its individual

members. The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1331 and 1343(3). The instant actions are presently before this court on: (1) cross-motions for summary judgment in civil action number 76-991A; (2) defendants' motion to dismiss civil action number 18627; and (3) defendants' motion to strike a portion of an affidavit filed in civil action number 76-991A. Before proceeding to the merits of these claims, a relatively brief recapitulation of the procedural history and factual circumstances underlying these actions is warranted.

Plaintiff originally brought civil action number 18627 against the Hospital Authority of Cobb General Hospital [hereinafter the "Authority"], a public hospital constructed with state and federal funds under the Hill-Burton Act, 42

U.S.C. §291 *et seq.* Plaintiff argued in essence that he was denied substantive and procedural due process by Cobb General Hospital's by-laws[1] which define a physician eligible

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[1] Eligibility for membership on the Cobb General Hospital Medical-Dental staff is evaluated pursuant to the following by-laws:

Section 1. Nature of Medical-Dental Staff Membership

Membership on the Medical-Dental Staff of Cobb General Hospital is a privilege which shall be extended only to professionally competent physicians and dentists who continuously meet the qualifications, standards, and requirements set forth in these bylaws.

Section 2. Qualification for Membership

a. Only physicians and dentists licensed to practice in the State of Georgia, who can document their background, experience, training, and demonstrated competence, their good reputation, and their ability to work with others, with sufficient adequacy to assure the Medical-Dental Staff and the governing body that any patient treated by them in the hospital will be given a high quality of medical care, shall be qualified for membership on the Medical-Dental Staff. No physician or dentist shall be entitled to membership on the Medical-Dental Staff or to the exercise of particular clinical privileges in the hospital merely by virtue of the fact that he is duly licensed to practice medicine or dentistry in this or in any other state or that he is a member of some professional organization, or that he had in the past, or presently has, such privileges at another hospital.

b. Acceptance of membership on the Medical-Dental Staff shall constitute the staff member's certification that he has in the past, and his agreement that he will in the future, strictly abide by the Principles of the Medical Ethics of the American Medical Association or the Code of Ethics of the American Dental Association, whichever is applicable, as the same are appended to and made a part of these bylaws.

Section 3. Conditions and Duration of Appointment

a. Initial appointments and reappointments to the Medical-Dental Staff shall be made by the governing body. The governing body shall act on appointments, reappointments or revocation of appointments only after there has been a

for membership on the staff as one 'holding a full practice license [or a duly licensed dentist].[2] In addition, plaintiff con-

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recommendation from the Medical-Dental Staff as provided in these bylaws; provided that in the event of unwarranted delay on the part of the Medical-Dental Staff, the governing body may act without such recommendation on the basis of documented evidence of the applicant's or staff member's professional and ethical qualifications obtained from reliable sources other than the Medical-Dental Staff.

b. Initial appointments shall be for a period extending to the end of the current Medical-Dental Staff year. Reappointments shall be for a period of not more than one Medical-Dental Staff year. For the purposes of these bylaws the Medical-Dental Staff year commences on the 1st day of June and ends on the 31st day of May of each year.

c. Appointments to the Medical-Dental Staff shall confer on the appointee only such clinical privileges as are specified in the notice of appointment, in accordance with these bylaws.

d. Every application for Medical-Dental Staff appointment shall be signed by the applicant and shall contain the applicant's specific acknowledgement of every Medical-Dental Staff member's obligation to provide continuous care and supervision of his patients, to abide by the Medical-Dental Staff bylaws, rules and regulations, and to accept committee assignments, and to participate in staffing the emergency service.

[2] It is clear under the law of Georgia that a podiatrist does not hold a full practice license because he may not perform amputations or administer general anesthesia. Specifically, Ga. Code § 84-601 states that:

> "Podiatry" (chiropody), for the purpose of this Chapter, means the diagnosis, medical, surgical, mechanical, manipulative and electrical treatment limited to the ailments of the human foot and leg. No podiatrist shall do any amputation or use any anesthetic other than local.
>
> "Podiatrists shall not be deemed to be included in the expressions "licensed doctors of medicine licensed to practice in this State" and the like.

tended that he was denied equal protection of the law because a certain class of doctors with limited licenses, dentists, were afforded staff privileges while podiatrists were not.

Plaintiff's motion for an *ex parte* temporary restraining order was denied by this court on July 18, 1973. The temporary and permanent injunction requests were joined for the purposes of a hearing which was held on August 21, 1973. In this court's order of October 24, 1973, we found that the acts of the Hospital Authority as they pertain to the public hospital here in question with state acts subject to the provisions of the Fourteenth Amendment. *Sosa* v. *Board of Managers of Val Verde Memorial Hospital,* 437 F.2d 173 (5th Cir. 1971); *Foster* § Mobile County Hospital Board, 398 F.2d 227 (5th Cir. 1968). However, we also held that each of plaintiff's claims were without merit and accordingly dismissed the action.

Plaintiff appealed to the United States Court of Appeals for the Fifth Circuit which vacated our order and remanded the action for further proceedings not inconsistent with its opinion. The majority opinion written by Judge Bell for a panel of the Court of Appeals agreed with this court's determination that plaintiff's equal protection claim had no merit.[3] Specifically, the Court of Appeals concluded that the class which plaintiff advocated consisting on one hand of full practice physicians and dentists and on the other of podiatrists.

> too large to be meaningful and we are unable to equate the various branches of the healing arts which would necessarily be included. Therefore, we reject appellant's equal protection claim. The facts simply do not make out a case of persons similarly situated within the equal pro-

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[3] In a concurring opinion, Chief Judge Brown expressed the somewhat different view that if "[t]he due process hearing [were] . . . conducted with due process, . . . [it might] precipitate a serious question of equal protection. *Shaw* v. *Hospital Authority of Cobb County,* 507 F.2d 625, 629 (1975).

> tection clause treatment requirement" that all persons similarly circumstanced shall be treated alike' [citations omitted].

Shaw v.*Hospital Authority of Cobb County, supra,* at 628.

With respect to plaintiff's due process arguments, the Court of Appeals clearly held that plaintiff had been deprived of and was now entitled to procedural due process consisting of a hearing before both the Medical-Dental Staff [hereinafter the "Staff"] and the Hospital Authority[4] which would be conducted upon the proper legal standard, i. e. plaintiff's liberty interest. In somewhat more careful terms the Court of Appeals intimated in footnote 2 of its opinion that regardless of how plaintiff's claim was characterized, *compare Woodbury* v. *McKinnon,* 447 F.2d 839 (5th Cir. 1971) *with Board of Regents* v. *Roth,* 408 U.S. 564, 92 S.Ct. 2701 L.Ed.2d 548 (1972), the essential inquiry concerned whether Dr. Shaw had a liberty interest protected by the Fourteenth Amendment. *Shaw* v.*Hospital Authority of Cobb County, supra* at footnote 2. This language is somewhat disturbing in that the Court of Appeals had already found a liberty interest of sufficient dimension to trigger procedural due process safeguards. Therefore, plaintiff's substantive due process claim would appear to turn upon the breadth rather than the existence of a liberty interest. In any event, Judge Brown's concurring opinion fleshes out footnote 2 by commenting that "in the procedural due process hearing, the intrinsic reasonableness of the regulation is the principal matter for inquiry." *Id.* at 629.

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[4] The Medical-Dental Staff and the Hospital Authority have separate by-laws. As the Court of Appeals observed, there was no showing made at the hearing of this action that amendment of the former would automatically result in every instance in a change in the latter. Therefore, the Court of Appeals found that the broad delegation power of the Hospital Authority, *see Sosa* v. *Board of Managers of Val Verde Memorial Hospital,* 437 F.2d 173 (1971), did not encompass the power to have the Medical-Dental Staff and only that group review plaintiff's application.

Since Plaintiff was afforded a hearing before the Staff and the Authority subsequent to the Court of Appeals mandate, we believe our responsibility entails: (1) examining the "procedural due process hearing" to determine whether it comported with the appellate mandate; and (2) deciding whether the Authority properly determined that the regulations in question are rationally based and reasonably related to a legitimate state purpose. *See Shapiro* v. *Thompson,* 394 U.S. 618, 89 S.Ct. 132, 22 L.Ed.2d 600 (1969); *Cf. Hayman* v. *Galveston,* 273 U.S. 414, 47 S.Ct. 363, 71 L.Ed. 714 (1927). However, one preliminary matter deserves more immediate attention.

DEFENDANTS' MOTION TO DISMISS

Defendants' motion to dismss civil action number 76-991A [hereinafter *"Shaw II"*] is based upon the "pendency" of a previous action, civil action number 18627 [hereinafter "Shaw I"]. Defendant argues in essence that *Shaw I* was remanded for further proceedings not inconsistent with the Court of Appeals' opinion and is still pending before this court. Apparently the Clerk of this Court is of essentially the same opinion because *Shaw I* is still numbered among the open files. Plaintiff in turn argues that the Court of Appeals vacated *Shaw I* and remanded the action to the Authority and Staff rather than to this court, thereby necessitating the filing of a new civil action upon completion of the administrative process. Although the judgment entered in *Shaw I* by the Court of Appeals states that the action was remanded to this court, we believe that it is in error because the appellate court clearly envisioned further administrative proceedings. In any event, the parties essentially agree that *Shaw I* and *Shaw II* encompass the same issues and should not both be presently pending before this court. Therefore, we concur in plaintiff's view that *Shaw I* should be closed yet subject to judicial notice by this court.

Accordingly, for the reasons herein above expressed, *Shaw* v. *The Hospital Authority of Cobb County,* C.A. No. 18627 is hereby ORDERED to be DISMISSED.[5]

CROSS-MOTIONS FOR SUMMARY JUDGMENT

Plaintiff argues that the Staff and Authority failed to comply with the appellate mandate by providing plaintiff with a procedural due process hearing directed to his underlying "liberty interest." Defendant in turn argues that plaintiff's liberty interest need only be considered at the outset in order to determine whether plaintiff is entitled to a procedural due process hearing and that it has little residual vitality in substantive due process terms. In any event, defendants argue that the hearing held before the Staff and the Authority were full and fair and therefore pretermitted the substantive due process issue.

It is clear in the first instance that plaintiff has a "liberty interest" of some dimension emanating from his state created right to practice podiatry. *See generally, Board of Regents* v. *Roth,* 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1973). However, that state created right does not in and of itself confer an absolute constitutional right upon plaintiff to practice at a public facility such as Cobb General Hospital. *Hayman* v. *Galveston,* 273 U.S. 414, 47 S.Ct. 363, 71 L.Ed. 714 (1927); *Sosa* v. *Board of Managers,* 437 F.2d 173 (5th Cir. 1971). Instead that liberty interest dictates that plaintiff's rights may only be restricted upon a showing that: (1) he was given an adequate procedural due process hearing; and (2) any decision to abridge plaintiff's liberty interest was grounded upon a rational basis designed to further a legitimate state interest. *See Shapiro* v. *Thompson,* 394 U.S. 618, 89 S.Ct.

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[5] Although defendants moved to dismiss *Shaw II,* we believe that they were concerned largely with the pendency of two actions. Therefore, it is proper to redirect their motion to dismiss and grant it with respect to *Shaw I.*

1322 22 L.Ed.2d 600 (1969). Regardless of how the latter issue is characterized, it is clear that the essential inquiry concerns the reasonableness of the restriction imposed by the state instrumentality. *Shaw* v. *Hospital Authority of Cobb County, supra.*

In general, the form of a procedural due process hearing is judged by a flexible standard which expands and contracts according to the nature of the interest in question. *Board of Regents* v. *Roth, supra, Morrissey* v. *Brewer,* 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972); *Woodbury*v.*McKinnon,* 447 F.2d 839 (5th Cir. 1971). However, in the instant action, the Court of Appeals was more specific and plaintly stated that the plaintiff "[was] entitled to a hearing [before the Staff *and* the Authority] conforming to the minimal requirements of procedural due process of notice and an opportunity to be heard." *Shaw* v. *Hospital Authority of Cobb County, supra* at 628. On July 17, 1975 plaintiff appeared at a hearing of a special committee of the Medical-Dental Staff of Cobb General Hospital at which the reasonableness of the subject by-laws was explored and the decision was made not to amend them. On October 15, 1975 the Hospital Authority, largely as a procedural step, accepted the recommendation of the Medical-Dental Staff and informed plaintiff of his right to a hearing before the Authority. On February 4, 1976, the Hospital Authority held a hearing and subsequently declined to amend its by-laws. In both instances, plaintiff was not only afforded notice and an opportunity to be heard, see *Grannis* v. *Ordean,* 234 U.S. 385, 34 S.Ct. 779, 58 L.Ed. 1363 (1914), but also accepted the right to appear personally and through counsel to present, confront, and cross-examine witnesses, *see Willner* v. *Committee on Character and Fitness,* 373 U.S. 96, 83 S.Ct. 1175, 10 L.Ed.2d 224 (1963); *Greene* v. *McElroy,* 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959), and to answer questions raised by members of the respective boards. Moreover, plaintiff's counsel specifically disclaimed any belief that members of the Authority might be biased. Finally, the Authority spent approximately three hours hearing plaintiff's

claims and actively and aggessively questioned plaintiff during a significant portion of that time. Following the hearings, plaintiff was given a three page examination of the reasons for the denial of his application. Therefore, it appears that these proceedings were "meaningful", *Armstrong* v. *Manzo*,, 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965) and comported with the minimum requirements of procedural due process. Accordingly, we must proceed to consider the concomitant question of whether the Authority was justified in concluding that the by-laws represented a reasonable encroachment upon plaintiff's liberty interest. *Shaw* v. *Hospital Authority, supra.*

It is clear in the first instance that the Authority has wide discretion in selecting persons for staff positions at Cobb County Hospital. *Sosa* v. *Board of Managers of Val Verde Memorial Hospital,* 437 F.2d 173 (5th Cir. 1971). In addition, it is clear that the authority did not violate the precise wording of the Guidelines of the Joint Commission on Accreditation of Hospitals by denying plaintiff's request for staff privileges because the guidelines provide that '[t]he governing body of the hospital . . . *may* grant clinical privileges to qualified, licensed podiatrists . . .'' (Emphasis added). The more difficult question is whether the by-laws are 'reasonably related to the operation of the hospital.' *Sosa* v. *Board of Managers of Val Verde Memorial Hospital, spura.* Defendants argue that it is their paramount purpose to provide the best possible services to the public within the confines of the limited resources available to the Authority. Toward this end they have devised by-laws which allow staff membership at Cobb General Hospital by persons with unrestricted licenses and dentists. Dentists are allowed on the staff because none of the doctors with unrestricted licenses typically engage in dental medicine. However, there was testimony given at the hearing before the Authority by Dr. Marvin N. Mitchell, an orthopedic surgeon that all of the functions performed by a podiatrist may be performed by an orthopedic surgeon. In addition, Dr. Mitchell's self-serving, albeit well-reasoned,

testimony suggested that orthopedic surgeons as a group can better serve the needs of the "whole patient" by diagnosing and treating physical and emotional causes which manifest themselves in terms of foot and leg disorders. Finally, defendants pointed out at the hearing held before the Authority that the term "podiatrist" simply is shorthand for a variety of training which differs from that of an orthopedic surgeon in that the former has two years of residency while the latter has a year of internship and four years of residence[6]. Plaintiff argues that podiatric training concentrates solely upon the leg and foot and therefore students receive more intensive and lengthy instruction in that particular portion of the human anatomy than do orthopedists. However, this rationale fails to speak to the question of whether, given the choice between placing a podiatrist or an orthopedic surgeon in the staff, the Authority made a rational decision in selecting only orthopedic surgeons who were qualified to treat the entire patient in any set of forseeable or unforseeable circumstances. Training is one of those relevant professional qualifications "which may be constitutionally applied in determining the class of people who are eligible to practice medicine in a public hospital." *Foster* v. *Mobile Hosp. Bd.*, 398 F.2d 227, 230 (5th Cir. 1968). Accordingly, we conlude that defendant's decision was founded upon a rational basis.

Two final observations are warranted. First, although considerations as to whether plaintiff may practice medicine at other hospitals is not strictly relevant to the issue of his liberty interest in practicing at defendant's public hospital, it is nevertheless clear that plaintiff is not being deprived of his livelihood by being denied staff rights at Cobb County Hospital. Rather, plaintiff testified that he practiced at his

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[6] Plaintiff testified that there is no longer any "internship" in podiatric training because the term internship by definition denotes a short period of exposure to a variety of areas of medical practice whereas podiatry concentrates exclusively on leg and foot treatment.

own offices as well as at several accredited hospitals in Cobb County, Georgia and other portions of the Atlanta metropolitan area.

Second, although we have repeatedly observed that podiatry is indeed a honorable profession, there remains a considerable amount of disagreement within the medical community as to the role which podiatrists should play in providing medical services to the American public. Evidently a temporary compromise was struck by the Joint Commission on Accreditation of Hospitals by permitting but not requiring hospitals to place on staff doctors in the emerging area of podiatric medicine. In the absence of a showing that the denial of staff privileges was not rationally based, *see Sosa* v. *Board of Managers of Val Verde Memorial Hosp., supra,* or that it was precipitated by invidious racial discrimination, *see Foster* v. *Mobile County Hospital Board, spura,* it is not the province of this court to legislate the final resolution of a problem indigenous to the medical profession.

Accordingly, for the reasons hereinabove expressed, defendants' motion for summary judgment is hereby GRANTED and plaintiff's motion for summary judgment is hereby DENIED. Moreover, because the action is closed by this order, defendant's motion to strike is hereby DENIED as MOOT.

In sum, this court has today: (1) DISMISSED civil action number 18627; (2) GRANTED defendants' motion for summary judgment and DENIED plaintiff's motion for summary judgment in civil action number 76-991A; and (3) DENIED as MOOT defendants' motion to strike a portion of an affidavit filed in civil action number 76-991A.

IT IS SO ORDERED.

This, the 31 day of October, 1977.

/s/ RICHARD C. FREEMAN
Richard C. Freeman
United States District Judge

APPENDIX B

United States Court of Appeals,
Fifth Circuit.

DR. ALIEN SHAW, *Plaintiff-Appellant,*

v.

THE HOSPITAL AUTHORITY OF COBB COUNTY AND ITS INDIVIDUAL MEMBERS, ET AL., *Defendants-Appellees.*

No. 74-1018

January 29, 1975.

Podiatrist brought action alleging his constitutional rights had been infringed by denial of his application for staff membership at public hospital on basis of bylaws of county hospital authority and of hospital's medical dental staff which authorized membership only to full-practice physicians and duly licensed dentists. The United States District Court for the Northern District of Georgia, Richard C. Freeman, J., denied podiatrist's requested relief, and podiatrist appealed. The Court of Appeals, Bell, Circuit Judge, held that rational basis test rather than compelling state interest test was applicable to podiatrist's claim of denial of equal protection; that proposed class of all persons licensed by state to practice healing arts was too large to be meaningful therefore requiring rejection of podiatrist's equal protection claim; that podiatrist's application for staff privileges of public hospital involved a liberty interest protected by the Fourteenth Amendment; and that hearing before hospital's medical dental staff which was not conducted with reference to podiatrist's underlying liberty interest violated podiatrist's right to procedural due process.

Vacated and remanded.

Brown, Chief Judge, filed separate concurring opinion.

Appeal from the United States District Court for the Northern District of Georgia.

Before BROWN, *Chief Judge*, and BELL and MORGAN, *Circuit Judges*.

BELL, *Circuit Judge*:

We are required in this appeal to apply the "procedural due process — liberty or property interest" principle outlined in *Board of Regents* v. *Roth*, 1972, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548, to the claim of a podiatrist to staff privileges in a public hospital. We vacate and remand for further consideration.

The complaint against the defendants, the Hospital Authority and its individual members, claimed arbitrary conduct on their part in denying appellant staff privileges at Cobb General Hospital, a hospital under the supervision of the defendants. The component parts of this general claim are alleged denials of substantive and procedural due process as well as equal protection, all as afforded appellant by the Fourteenth Amendment.

Appellant, Dr. Shaw, is a Doctor of Podiatric Medicine and Surgery licensed to practice in the State of Georgia. His competence and individual qualifications have not been challenged by the defendants. He has been granted staff privileges at Bolton Road Hospital in Atlanta, Georgia, and at Doctor's Hospital in Tucker, Georgia, both private hospitals. He is currently engaged in the practice of his profession in the immediate vicinity of Cobb General Hospital.

Appellant's application for staff membership at Cobb General Hospital was denied on the basis of the by-laws of the Hospital Authority and by the by-laws of its "Medical-Dental Staff" which allow membership only to full-practice physicians and duly licensed dentists. A podiatrist such as Dr. Shaw would not come within this definition as Ga.Code Ann.

§84-601, defines "podiatry" as "diagnosis, medical, surgical, mechanical, manipulative and electrical treatment . . . of the human foot and leg" and states that "[n]o podiatrist shall do any amputation or use any anesthetic other than local." Thus podiatrists do not hold full-practice licenses because under Ga.Code Ann. §84-901 the "practice of medicine" is not defined as limited to any area of the body.[1] Further the power to grant licenses to practice podiatry is vested in the State Board of Podiatry Examiners while the power to grant licesnses to practice medicine is vested in the Composite State Board of Medical Examiners. Dentists are also limited by law to one area of the body (*See* Ga.Code Ann. §84-701 et seq.) and they are licesned other than by the Composite Board of Medical Examiners. The Hospital Authority explains its exception for dentists on the grounds that they perform functions which are not offered by other members of the medical community. This is not the case with podiatrists, as the services they provide are already available from the existing staff, specifically orthopedic surgeons.

The Hospital Authority of Cobb County is the governing body of Cobb General Hospital, a public hospital constructed with state and federal funds under the Hill-Burton Act, 42 U.S.C.A. §291 et seq. Therefore its acts in precluding Dr. Shaw from staff privileges are state acts subject to the provisions of the Fourteenth Amendments. *Sosa* v. *Board of Managers of Val Verde Memorial Hosp.*, 5 Cir., 1971, 437 F.2d 173; *Foster* v. *Mobile County Hosp. Bd.*, 5 Cir., 1968, 398 F.2d 227.

Appellant made application for staff privileges at Cobb General on April 19, 1973. He expressed a desire to meet with

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[1] Ga.Code Ann. §84-601 has since been amended to clarify this. "Podiatry shall not be deemed to be included in the expression 'licensed doctors of medicine' 'doctors of medicine,' 'doctors of medicine licensed to practice in this State' and the like." [1973] Ga.L. 824-825.

the executive committee of the Medical-Dental Staff to discuss a change in its by-laws, indicating that he was aware that same did not provide for podiatrists on the staff. Dr. Shaw was invited to and attended the meeting of May 8, 1973 in which he was given some 30 minutes to pass out literature and answer questions. After Dr. Shaw left the meeting, the Executive Committee decided to recommend to the Hospital Authority that no change be made in the Staff by-laws.

Dr. Shaw was informed of this action and his attorney responded with a letter to the Hospital Authority objecting to the rejection of Dr. Shaw's application on the basis of the by-laws and appealing on Dr. Shaw's behalf to the members of the Hospital Authority to reconsider his rejection. The attorney stressed that his client could not be denied staff membership on the basis of by-laws which were unreasonable, arbitrary and discriminatory. A reply to the attorney stated that his letter had been presented to the Hospital Authority at its regular meeting on June 20, 1973 and that "[t]he Authority did not feel it appropriate to direct the Staff to change its by-laws nor did the Authority take any action toward changing its own by-laws."

Appellant contends that the Hospital Authority's denial of his application on the basis of by-laws which exclude podiatrists as a class while admitting dentists, who are also limited by law to one area of the body, is a violation of his equal protection rights. He maintains that he is licensed by the State of Georgia to perform certain operations and that the hospital facilities are necessary for the convenience of his patients who reside in Cobb County, the area of his practice, and alleges this to be a denial of substantive due process. He also claims a denial of procedural due process with respect to the hearing process.

In the view we take of this case, we reject the equal protection claim and find it unnecessary to denominate, as such,

any issue as to substantive due process.[2] We do find a liberty interest subject to procedural due process safeguards, and because this case was not considered by the defendants on this basis, we direct that it be reconsidered.

Under the equal protection claims, appellant attacks the classifications created by appellee's by-laws, arguing that all those licensed by the State of Georgia to practice the healing arts are members of one class. He contends that granting staff privileges to full-practice physicians and dentists while denying them to podiatrists creates classifications which have no rational basis.[3] We believe that this argument is too attenuated. Such a class is too large to be meaningful and we are unable to equate the various branches of the healing arts which would necessarily be included. Therefore, we reject appellant's equal protection claim. The facts simply do not make out a case of persons similarly situated within the equal protection clause treatment requirement "that all persons similarly circumstanced shall be treated alike." *Royster Guano Co.* v. *Virginia*, 1920, 253 U.S. 412, 415, 40 S.Ct. 560, 562, 64 L.Ed. 989, 991.

Finally, Dr. Shaw contends that he was denied procedural due process because his application was considered in

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[2] Appellant relies on *Woodbury* v. *McKinnon*, 5 Cir., 1971, 447 F.2d 839, where we held that once a staff member, a doctor had a right to reappointment until the governing authorities determined after a hearing confirming to the minimum requirements of procedural due process that he did not meet the reasonable standards of the hospital. This was the extent to which he was entitled to substantive due process. The *Roth* decision renders this argument unnecessary. Regardless of the label of substantive due process, our inquiry centers on whether Dr. Shaw had a liberty or property interest protected by the Fourteenth Amendment.

[3] After examining the nature of the classification and the interest involved, we agree that the rational basis rather than the compelling state interest test is applicable. *See Shapiro* v. *Thompson*, 1969, 394 U.S. 618, S.Ct. 1322, 22 L.Ed.2d 600. Cf. *Hayman* v. *Galveston*, 1927, 273 U.S. 414, 47 S.Ct. 363, 71 L.Ed. 714.

summary fashion by appellee. His criticism is aimed at the thirty-minute hearing before the Medical-Dental Staff and the Hospital Authority's refusal to consider changing its by-laws on the strength of this hearing. Before the requirements of procedural due process apply there must be a deprivation of interest encompassed by the Fourteenth Amendment's protection of liberty and property. *Board of Regents* v. *Roth*, *supra*.

Although both the terms "liberty" and "property" are broad and not defined with exactness, *National Ins. Co.* v. *Tidewater Co.*, 1949, 337 U.S. 582, 646, 69 S.Ct. 1173, 1209, 93 L.Ed. 1556, 1596 (Frankfurter, J., dissenting); *Meyer* v. *Nebraska*, 1923, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042, 1045, a number of cases have construed these terms. Liberty is not confined to mere freedom from bodily restraint but extends to the full range of conduct which the individual is free to pursue. *Bolling* v. *Sharpe*, 1954, 347 U.S. 497, 499-500, 74 S.Ct. 693, 694-695, 98 L.Ed. 884, 887. Contemplated within this term is the right to practice any of the common occupations of life, and for others to engage the individual to perform those acts which are his occupation. These rights are within the Fourteenth Amendment. *Meyer* v. *Nebraska*, *supra*, 262 U.S. at 400, 43 S.Ct. at 627. Appellant, in seeking staff privileges at appellees' hospital, seeks to engage in his occupation as a podiatrist and this is a liberty interest protected by the Fourteenth Amendment.[4] He is therefore entitled to a hearing conforming to minimal requirements of procedural due process of notice and an opportunity to be heard.

This brings us to the question whether appellant was afforded such a hearing. We conclude that he was not.

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[4] In finding that Dr. Shaw has a liberty interest, we need not reach the question whether he has a claim of entitlement amounting to a property interest. For a discussion see *Board of Regents* v. *Roth*, *supra*; *Goldberg* v. *Kelly*, 1970, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287.

There are two principal reasons for the shortcoming in procedural due process. The first is that hearing before the Medical-Dental Staff would not suffice as a hearing before the Hospital Authority. Although the Authority may properly delegate many decisions to the Staff, *Sosa* v. *Board of Managers*, *supra*, 437 F.2d at 177, these two groups are separate and each have their own set of by-laws which preclude podiatrists from staff privileges. There is no evidence that a change in the Medical-Dental Staff by-laws would automatically result in a change in the Hospital Authority's by-laws. Therefore, Dr. Shaw must be afforded hearings before both groups.

Appellees argue that appellant did not request a hearing before the Authority and so they were justified in relying upon the recommendation of the Medical-Dental Staff. This argument is without merit in the face of the District Court's finding that appellee had determined not to change its by-laws despite appellant's failure to request a hearing. This is relatively unimportant, in any event, in view of our disposition of the other basis of procedural due process denial.

We find that the hearing accorded appellant was not conducted on the proper legal standard as to his underlying right, i.e., the liberty interest. The procedural due process to which Dr. Shaw was entitled had to be fashioned for and directed to that liberty interest.

Because his application was not so considered, we vacate the judgment of the District Court and remand with direction that the application of Dr. Shaw to be reconsidered by defendants and the Medical-Dental Staff on a basis not inconsistent herewith.

Vacated and remanded.

JOHN R. BROWN, *Chief Judge* (concurring):

I concur in the opinion and the result. I would emphasize, however, that in the procedural due process hearing the intrinsic reasonableness of the regulation is the principal matter for inquiry.

While I would join in the Court's conclusion that the practice of podiatry and medicine do not coalesce, the practice of podiatry is a statutorily recognized right to engage in procedures and techniques which might be characterized as "medically radical". The State of Georgia recognizes that persons of this profession have significant professional qualifications, responsibilities, and privileges.

Considering all that Georgia permits and encourages them to do, the question perhaps boils down to whether any rational basis exists for denying podiatrists, or more important their patients, the essential facilities of a twentieth century hospital. Before podiatrists can be relegated in the performance of their duties to a garret, there must be a rational basis for regulations which effectively deny access to modern hospital facilities. The due process hearing, if conducted with due process, may therefore, precipitate a serious question of equal protection.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-3436

D.C. Docket No. Ca-18627 and CA-76-991A

DR. ALAN SHAW,
Plaintiff-Appellant,

v.

THE HOSPITAL AUTHORITY OF COBB COUNTY, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

Before BROWN, HILL and RANDALL, *Circuit Judges.*

Judgment

August 1, 1980

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiff-appellant pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

March 31, 1980

Issued as Mandate: July 30, 1980

APPENDIX D

Decision of the Hospital Authority of Cobb County

State of Georgia

County of Cobb

In Re: Request of Dr. Alan Shaw for a change in the Bylaws authorizing the admission of podiatrists to the staff of Cobb General Hospital.

The above and foregoing matter came on for hearing before the Hospital Authority of Cobb County at 6:30 p.m. on Wednesday, February 4, 1976.

Dr. Alan Shaw appeared at the meeting with his attorney and presented testimony in support of his position. Dr. Shaw furnished to the Authority certain documents he felt to be pertinent to this application.

Dr. Marvin Mitchell, an orthopedic surgeon on the staff of Cobb General Hospital, appeared as a witness and was examined by hospital counsel regarding his opinion as to the proposal of Dr. Shaw for a change in the bylaws. Dr. Mitchell was cross-examined by the hospital attorney. Both witnesses were asked questions by the members of the Hospital Authority.

The attorney for Dr. Shaw and the attorney for the hospital stipulated that the transcript of the trial of this matter that was previously held in the United States District Court for the Northern District of Georgia, Atlanta Division, being Civil Action File No. 18627; all exhibits and the transcript of the hearing before the Medical-Dental Staff of the hospital held at 7:45 p.m. on the 17th day of July, 1975; applicant's exhibits 1, 2 and 3 that were submitted on February 4, 1976; hospital exhibits 1, 2 and 3 submitted February 4, 1976 and the testimony of Dr. Richard B. Jackson that was given before the District Court and was contained in pages 157-178 of the transcript of the trial in the

District Court, all be considered as evidence before the Hospital Authority and be used by them in their deliberations as to the disposition of the request of Dr. Shaw.

All members of the Hospital Authority were present at the hearing on February 4, 1976. The documents enumerated in the previous paragraph were reviewed, studied and considered by the Authority members and a meeting was held at 6:30 p.m. on Monday, February 16, 1976, of only the Hospital Authority members for further, thorough and in-depth consideration of the request of Dr. Shaw.

After having heard the testimony, reviewed the documents and exhibits and thoroughly considering the request of Dr. Shaw, it is the conclusion of the Hospital Authority that the services that would be provided by podiatrists are already being provided by staff physicians who have unlimited license to practice medicine; have more extensive training than podiatrists and can care for the total needs of their patients. The only doctors with limited licenses permitted to practice at Cobb General Hospital are dentists and they are permitted to practice for the sole reason that they provide a service that is not otherwise available through physicians with unlimited licenses to practice medicine.

The Hospital Authority of Cobb County has always required that the standards of doctors admitted to the staff of Cobb General Hospital should be higher than those required merely by licensure. Never have physicians and dentists been admitted to the staff of Cobb General Hospital solely on the basis of their license to practice. Clinical privileges in surgery are not granted to practitioners who possess only the amount of training required of podiatrists. This is true even though they may be physicians with unlimited license.

The Authority realizes that podiatry is now listed by the Joint Commission on Accreditation of Hospitals as a discipline which *may* be allowed in an accredited hospital. However, the Joint Commission has always placed the

responsibility on each institution to establish and maintain its own acceptable standards and levels of care.

Based on all of the evidence submitted, it is the unanimous decision of the Hospital Authority of Cobb County that the request of Dr. Alan Shaw be, and it is hereby, denied.

THE HOSPITAL AUTHORITY
OF COBB COUNTY

By LEON H. HAMES
Leon H. Hames
Chairman

February 18, 1976

Supreme Court, U. S.
FILED
OCT 8 1980
MICHAEL RODAK, JR., CLERK

No. 80-385

IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

DR. ALAN SHAW,

Petitioner,

v.

THE HOSPITAL AUTHORITY OF COBB COUNTY, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

QUESTIONS PRESENTED FOR REVIEW

The petition for certiorari sets out accurately some of the questions presented for review but for purposes of accuracy and amplification Respondents supplement those questions as follows:

1. Does a discipline of limited health care practitioners who are licensed by a state enjoy a substantive constitutional right to practice their discipline in a public hospital merely by virtue of licensure?

2. Did the medical staff of Cobb General Hospital and the Hospital Authority of Cobb County conduct procedural due process hearings comporting with the Appellate Mandate in *Shaw v. Hospital Authority of Cobb County,* 507 F.2d 625 (1975), (Shaw I) and base its decision to exclude the discipline of podiatry upon credible evidence rationally related to the operation of the hospital?

3. Was the decision of the Fifth Circuit Court of Appeals in Shaw I, supra, dispositive of petitioner's equal protection claim by virtue of the doctrine of the law of the case?

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OPINION BELOW

The opinion below, delivered on the 31st day of March, 1980, is appended to the Petition for a Writ of Certiorari.

JURISDICTION

Respondents do not question the jurisdiction as set forth in the Petition.

STATEMENT OF THE CASE

Petitioner's statement of the case is substantially correct. However, for further clarity, respondents supplement the statement of the case as follows:

Defendants are the Hospital Authority of Cobb County, and its individual members, appointed by the governing authority of Cobb County, pursuant to law, and they administer and supervise the functions of Cobb General Hospital, a tax supported public hospital constructed with state and federal funds. State and federal funds are used in the operation of the hospital.

The Authority's bylaws presently provide that only Doctors of Medicine and Doctors of Osteopathy, both being licensed by the Composite Board of Medical Examiners, and Doctors of Dentistry, may be granted staff privileges at Cobb General Hospital. There is no provision in the bylaws for granting privileges or staff membership to Doctors of Podiatric Medicine who are licensed by the State Board of Podiatric Examiners, or to any other practitioner holding a limited license or licensed by a board other than the Composite Board of Medical Examiners.

The Hospital is accredited by the Joint Commission on Accreditation of Hospitals, the national accrediting agency for hospitals. Joint Commission standards contain provisions for granting privileges in hospitals to podiatrists but make the granting of privileges entirely discretionary with the individual hospitals. Failure to admit podiatrists does not affect accreditation.

On July 17, 1975, Shaw appeared with his attorney at a hearing of the Staff specially set for consideration of his request that the bylaws be amended to make it possible for podiatrists to be admitted to the staff. This hearing was held to comply with the Mandate of the Fifth Circuit Court of Appeals in Shaw I, supra, and extensive discussion occurred at the hearing. The matter was thereafter referred to a special study committee of the staff which recommended that the requested changes not be approved and that no department of podiatry or podiatric service be created at Cobb General Hospital. The staff itself adopted this recommendation by a divided vote. Shaw was furnished written reasons for the staff decision.

On February 4, 1976, Dr. Shaw appeared with his counsel before the Authority for a hearing specially set to consider his proposed bylaw changes. A three hour hearing was held, during which Dr. Shaw and his counsel presented his claim. The Authority members actively participated in the hearing by reviewing materials submitted by Dr. Shaw and questioning him concerning podiatry in general and his proposed amendments.

At both hearings, Dr. Shaw was not only afforded an opportunity to be heard, but the hearings were set at times convenient for him, and he accepted the right to appear personally with his counsel and to present extensive evidence and cross examine witnesses and to answer questions propounded by members of both bodies.

A podiatrist does not come within the definition of "full practice physicians." Ga. Code Ann. §84-601 defines "podiatry" as "diagnosis, medical, surgical, mechanical, manipulative and electrical treatment . . . of the human foot and leg" and states that "no podiatrist shall do any amputation or use any anesthetic other than local." Thus podiatrists do not hold full-practice licenses since under Ga. Code Ann. §84-901, the "practice of medicine" is not defined as limited to any area of the body.

Additionally, petitioners assertion that the hospital authority "never made any determination or conclusion concerning the petitioner's qualifications to perform the requested procedures" is not entirely correct, since one of the findings of the Authority following the hearing was that "the services that would be provided by podiatrists are already being provided by staff physicians who have unlimited license to practice medicine; have more extensive training than podiatrists and can care for the total needs of their patients." The inference of this finding is that Dr. Shaw, or any podiatrist, possesses inferior qualifications to those possessed by the existing staff of orthopedic and general surgeons.

ARGUMENT

I

Petitioner in this case seeks to drastically rewrite constitutional doctrine in the area of professional or occupational pursuits by urging this Court to recognize a substantive fundamental constitutional right to practice medicine or a related discipline in a public hospital.

Under petitioner's expanded view of constitutional law in this area, licensure by a State Board would become virtual investure to medical staff membership at any public hospital. No court in the United States has recognized such an expanded interpretation of the medical practitioner's rights or the certifying board's role.

There can be no question that licensure to practice a profession carries with it a "liberty interest" of some dimension. *Board of Regents v. Roth,* 408 U.S. 546, 92 S.Ct. 2701, 33 L.Ed. 2d 548 (1975); *Shaw v. Hospital Authority of Cobb County,* 507 F.2d 625 (1975). However, all courts have recognized the traditional responsibility of local governing boards to govern their hospitals, if pursued reasonably and responsibly.

In *Foster v. Mobile County Hospital Board,* 398 F.2d 227 (1965), the Fifth Circuit held that staff appointments may be constitutionally refused if the refusal is based upon any reasonable grounds, such as the professional or ethical qualifications of the physician or the common good of the public and the hospital. "The subjectives of selection simply cannot be minutely codified. The governing body of a hospital must therefore be given great latitude in prescribing the necessary qualifications for potential applicants." *Foster v. Mobile County Hospital Board,* supra.

A list of surgical procedures and services desired to be performed by the petitioner was submitted to the Staff and Authority in the within case. The Hospital had chosen to grant privileges to perform those procedures to physicians and surgeons holding full unrestricted licenses to practice medicine. The training, license to practice, and scope of practice of a full practice physician licensed by the Composite State Board of Medical Examiners is different from that of a podiatrist who is licensed by the State Board of Podiatry Examiners and whose license covers only the restricted area of the foot and ankle.

This Court has held that a doctor has no constitutional right to staff privileges of a hospital merely because he is licensed to practice. *Hayman v. Galveston,* 273 U.S. 414 (1927). Podiatrists fail to meet the requirements for general surgical privileges or orthopedic surgery privileges as set by the Hospital Authority and the staff,[1] although the procedures they would seek to perform are the same as would be performed by an orthopedic surgeon. To obtain such full surgical privileges or orthopedic surgical privileges requires more training than podiatrists are required to have[2] and requires different licenses from the State of Georgia. There is no unconditional right to privileges if the Hospital Authority chooses to exact additional standards reasonably related to the operation of the hospital. *Davidson v. Youngstown Hospital Association,* 19 Ohio App. 2d 246, 250 N.E.2d 892 (1969).

The *Davidson* case, supra, concerned the admission of podiatrists to staff privileges, and the Court held that it could not find that the hospital had acted arbitrarily, unreasonably, or capriciously in refusing them hospital privileges. This case was cited as authority by the Federal Court in the case of *Sosa v. Board of Managers of Val Verde Memorial Hospital,* 437 F.2d 173 (1971), a case in which the Fifth Circuit Court of Appeals held that the governing board of a hospital must be given great latitude in prescribing the

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[1]Surgical privileges at Cobb General Hospital requires "board certification" or "board eligibility" of the physician seeking surgical privileges. Orthopedic and general surgery certifying boards require one year of internship and four years of residency. See excerpt from Cobb General Hospital Rules and Regulations of the Department of Surgery-Anesthesiology which have been produced at page 1a of the Appendix.

[2]Petitioner testified that there is no "internship" in podiatric training.

necessary qualifications for potential applications to the staff, but emphasized that in exercising its broad discretion it could refuse such applicants only for matters reasonably related to the operation of the hospital. The decision also indicated the restraint which must be exercised in judicial consideration of challenges to hospital administration:

> No court should substitute its evaluation of such matters for that of the Hospital Board. It is the Board, not the court, which is charged with the responsibility of providing a competent staff of doctors. The Board has chosen to rely on the advice of its Medical Staff, and the court cannot surrogate for the Staff in executing this responsibility. Human lives are at stake, and the governing board must be given discretion in its selection so that it can have confidence in the competence and moral commitment of its staff. The evaluation of the professional proficiency of doctors is best left to the specialized expertise of their peers, subject only to limited judicial surveillance. *The court is charged with the narrow responsibility of assuring that the qualifications imposed by the Board are reasonably related to the operation of the hospital and fairly administered. In short, as long as staff selections are administered with fairness, geared by a rationale compatible with hospital responsibility, and unencumbered with irrelevant considerations, a court should not interfere.* (Emphasis added.)

Petitioner urges that the Hospital Authority's consideration of the more extensive residency and internship training, and less restricted licensure, enabling physicians to treat the "whole patient", are irrelevant considerations, and that the Hospital Authority's decision was mere mechanical compliance with the due process notice and hearing requirements.

The difference in training between differing disciplines has been recognized, however, by this Court and most others as being of considerable relevance in determining professional qualifications. Indeed, training is one of those relevant professional qualifications "which may be constitutionally applied in determining the class of people who are eligible to practice medicine in a public hospital." *Foster v. Mobile County Hospital Board,* 398 F.2d 227, 230.

The courts and legislative bodies have drawn other discipline-based distinctions in the past which have survived appellate review. As recently as 1979 the Fifth Circuit was presented with a discrimination claim by optometrists who asserted that the reimbursement scheme of the Medicare Act was arbitrary and denied equal protection since the services of a doctor of optometry were not reimbursible while those of a doctor of medicine were.

The Fifth Circuit noted that in the face of Congress' conscientious effort to maximize Medicare's coverage for various healing professions, including a study of the desirability of extending Part B Medicare funds for services of additional types of licensed health practitioners and a study of the difference of levels of training, it could not be said that Congress acted irrationally in providing reimbursement distinctions between the diagnostic services provided by a medical doctor and those provided by an optometrist.

In considering the constitutional claim of irrational classification, where the optometrists claimed irrationality because the classification failed to account for overlaps of services performed by different classes of doctors, the Court stated: "This inquiry employs a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classi-

fications is neither possible nor necessary. *Massachusetts Board of Retirement v. Mungra,* 427 U.S. 307, 314, 96 S.Ct. 2562, 2567, 49 L.Ed. 2d 520 (1976); *Dandridge v. Williams,* 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed. 2d 491 (1976). Our power to overturn a statute, where fundamental interests or suspect groups are absent, is limited to the situation in which 'the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational. *Barry v. Barchi,* _____ U.S. _____, 99 S.Ct. 2642, 60 L.Ed. 2d _____ (1979), quoting *Vance v. Bradley,* _____ U.S. _____, 99 S.Ct. 939, 59 L.Ed. 2d 171 (1979). Accordingly, plaintiffs would raise a substantial constitutional claim only if they could show that Congress, in distinguishing between the diagnostic services provided by optometrists and doctors of medicine for the purposes of Medicare reimbursement acted irrationally.'

"[A]lthough there may be some overlap of diagnostic procedures of optometrists and opthalmologists, their training was sufficiently different to indicate that the funds of the Part B program could best be used by limiting reimbursement to optometrists.

"The failure to provide equal benefits to every conceivable interest in enacting reform legislation does not violate the equal protection clause." *Pushkin v. Califano,* 600 F.2d 489 (1979).

The Fifth Circuit again in *Berman v. Florida Medical Center, Inc.,* 600 F.2d 466 (1979), rejected an allegation that hospital bylaws were arbitrarily class-based when in fact they were lawfully discipline-based in a case hauntingly similar to the within case, which gives expression to some hypothetical consequences in the medical field should Dr.

Shaw's expanded view of "liberty interest" be adopted by this Court. The Court there held that:

> "[This] case locates Dr. Berman, (an osteopathic physician), not in any class of osteopathic as opposed to allopathic physicians, but in that merely of *physicians* who have not served an AMA residency but wish to practice a specialty in defendant's hospital without having done so. That they may have received equivalent training of another sort does not invalidate the hospital's requirement, which is a reasonable one. Doubtless there are midwives in the Fort Lauderdale area quite capable of handling normal childbirth, but this circumstance would scarcely render the requirement of a medical license for practice in this hospital unconstitutional or invalid. Having specified a reasonable means of access to its staff privileges, defendant is not required to shell the woods, canvassing one by one other modes that might or might not be its equivalent."

This Court has directly and eloquently addressed the discrimination claim presented by Dr. Shaw before. In *Hayman v. City of Galveston, et al.*, 273 U.S. 414 (1927), such differences in training and method of treatment between osteopathic and allopathic physicians were considered and the Court held:

> "We cannot say that a regulation excluding from the conduct of a hosptial the devotees of some of the numerous systems or methods of treating diseases authorized to practice in Texas, is unreasonable or arbitrary. In the management of a hospital, quite apart from its use for educational purposes, some choice in methods of treatment would seem inevitable, and a selection based upon a classification having some basis in the exercise of the judgment of the state board whose action is challenged is not a denial of the equal protection of the laws."

The reasoned decisions of the courts should not be ignored and the traditionally recognized management dis-

cretion of the local governing authorities undermined or abrogated simply on petitioner's bare conclusion that respondents made their decision without a rational basis. As observed by the trial court and the Fifth Circuit Court of Appeals:

> "[T]here remains a considerable amount of *disagreement within the medical community* as to the role which podiatrists should play in providing medical services to the American public. Evidently a temporary compromise was struck by the Joint Commission on Accreditation of Hospitals by permitting but not requiring hospitals to place on staff doctors in the *emerging area* of podiatric medicine." Shaw v. Hospital Authority of Cobb County, et al., 614 F.2d 946 (Emphasis added.)

II

In the first appearance of this case before the Fifth Circuit (Shaw I), Dr. Shaw litigated the same issue of equal protection of the laws that he sought to raise in the pleadings in the second civil action.

The majority opinion in Shaw I held that Shaw's equal protection claim was without merit. Specifically, the Court of Appeals concluded:

> "Under the equal protection claims, appellant attacks the classifications created by appellee's bylaws, arguing that all those licensed by the State of Georgia to practice the healing arts are members of one class. He contends that granting staff privileges to full-practice physicians and dentists while denying them to podiatrists creates classifications which have no rational basis. We believe that this argument is too attenuated. Such a class is too large to be meaningful and we are unable to equate the various branches of the healing arts which would necessarily be included. Therefore, we

> reject appellant's equal protection claim. The facts simply do not make out a case of persons similarly situated within the equal protection clause treatment requirement 'that all persons similarly circumstanced shall be treated alike.' *Royster Guano Co. v. Virginia,* 1920, 253 U.S. 412, 415, 40 S.Ct. 560, 562, 64 L.Ed. 989, 991." *Shaw v. Hospital Authority of Cobb County,* supra at p. 627.

In so ruling, this Court specifically rejected Shaw's equal protection claim. No rehearing was requested, and the decision and judgment is the law of the case as to any issue of equal protection so litigated.

In *Diplomat Electronics, Inc. v. Westinghouse Electronic Supply Co.,* 430 F.2d 38 (5th Cir. 1970), it is stated that the determinations of law in a previous appeal will be binding on remand and in subsequent appeal unless clearly erroneous. 1B *Moore's Federal Practice,* Section 0.404(10).

In *Lehrman v. Gulf Oil Corporation,* 500 F.2d 659 (1974), the Fifth Circuit made the following observation: "[T]he 'law of the case' doctrine . . . plays an important role in subsequent appeals. This laudable and self-imposed restriction is grounded on the sound public policy that litiation must come to an end. An appellate court cannot efficiently perform its duty to provide expeditious justice to all if questions once considered and decided by it were to be litigated anew in the same case upon any and every subsequent appeal."

The Fifth Circuit had previously recognized that though the Court has power to adopt a position different from that adopted on an earlier appeal, it would not do so in a case in which the appellants did not seek a rehearing or make application for certiorari with respect to the decision on the prior appeal. In *United States v. Dickinson,* 476 F.2d 373

(1973), it held as follows: "The determination which we make is that the prior opinion and decision of this Court established the law of the case from which we do not depart. Orderly judicial procedure requires that there be an adherence to a decision upon an earlier appeal of the same case. (citations omitted) Although the Court has power to adopt a position different from that of the earlier appeal, we are not persuaded that such action is required in this cause. It is to be noted that the appellants did not seek a rehearing or make application for certiorari of the decision on the prior appeal."

CONCLUSION

There is a distinction between the various disciplines of the healing arts which is very real, and to allow a governing board or legislative body to draw upon its common experience and wisdom and choose the services of the more extensively trained, experienced and recognized discipline over the less scientifically recognized one, is not prohibited discrimination. Respondents therefore urge that the petition for the Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX A

COBB GENERAL HOSPITAL
Department of Surgery-Anesthesiology

RULES AND REGULATIONS

ORGANIZATION

The Department of Surgery-Anesthesiology will include the following divisions: Anesthesiology, General Surgery, Neurological Surgery, Ophthalmology, Oral Surgery, Orthopedics, Otorhinolaryngology, Plastic Surgery, Protology, Thoracic Surgery, Traumatic Surgery, and Urology.

These rules and regulations will supersede any rules and regulations made by an specialty or subspecialty of surgery.

PRIVILEGES

Applicants desiring privileges as specialties in these divisions of the Surgery-Anesthesiology Department shall have met the resident training requirements for the particular specialty boards and be qualified to take examination for board certification. Board certification is desirable but not mandatory. The status for a candidate for privileges in the Surgery-Anesthesiology Department shall be determined by the Credentials Committee based on the usual requirements for Staff membership plus one of the following: (a) certification of the American Board of General Surgery, or surgical specialty; (b) full membership in American College of

Surgeons with a specialty or general surgery; (c) shall have met the resident training requirements for general surgery or the particular specialty board and be qualified to take examination for board examination. Full privileges allows one to perform all procedures under his chosen specialty. A surgeon is expected, however, to perform only those procedures that are consistent with his skill and degree of training.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No. 80-385

DR. ALAN SHAW,

Plaintiff-Appellant,

v.

THE HOSPITAL AUTHORITY OF COBB COUNTY AND ITS INDIVIDUAL MEMBERS,

Defendants-Appellees.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief of Respondents in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were mailed, postage prepaid, as follows:

WERNER STRUPP
3301 New Mexico Avenue, N.W.
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This _____ day of October, 1980

/s/ A. Harris Adams
Attorney for Respondents